EFiled: Nov 14 2014 01:13PM EST
Filing ID 56339349
Case Number 441,2014 D

IN THE SUPREME COURT OF THE STATE OF DELAWARE

NATIONWIDE EMERGING MANAGERS, LLC, Defendant/Counter-Plaintiff/ Third-Party Plaintiff Below-Appellant, and NATIONWIDE CORPORATION, and NATIONWIDE MUTUAL INSURANCE CO., Defendants Below-Appellants, v. NORTHPOINTE HOLDINGS, LLC, Plaintiff/Counter-Defendant Below-Appellee, and NORTHPOINTE CAPITAL, LLC, PETER CAHILL, MARY CHAMPAGNE, ROBERT GLISE, MICHAEL HAYDEN, JEFFREY PETHERICK, STEPHEN ROBERTS, and CARL WILK, Third-Party Defendants Below-Appellees.	)	No. 441, 2014 On Appeal from the Superior Court C.A. No. N09C-11-141-ALR

APPELLANTS' REPLY BRIEF

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Dated: November 14, 2014

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PRELIMINARY STATEMENT[1]

NorthPointe insists that it "has indeed asserted its interpretation that §1(a) prohibits Nationwide from acting to terminate the sub-advisory agreements unless the provisions for termination are satisfied, i.e., Schedule 2, *inter alia*." AB at 26. It never explains, however, what the "*inter alia*" are, and it never offers a competing interpretation of the PA's "provisions for termination" that gives meaning to the unambiguous language of §1(a) and the listing of the NorthPointe NVIT as the first of seven funds under the heading "Sub-Advised Funds" in Exhibits D's Schedule 1.[2]

Indeed, it is unclear whether NorthPointe now endorses the Superior Court's holding that the NorthPointe NVIT's inclusion in the schedule's list of "Sub-Advised Funds" was a typographical error; or, if NorthPointe continues to maintain – as it did in all four of its complaints, its opening trial statement, closing argument, and the deposition of its own 30(b)(6) witness – that the fund is one of the "Sub-Advised Funds," a term defined in §1(a) as "the funds included on Schedule 1 to Exhibit D." On one hand, NorthPointe argues in its brief that the PA obligated Nationwide not to "replace NorthPointe as the sub-advisor on the [NorthPointe NVIT] . . . or terminate NorthPointe as sub-adviser on any of *the*

[1] The abbreviations used in the Opening Brief ("OB") and Answering Brief ("AB") are also used herein. All emphasis in quotations is added unless otherwise stated.

[2] At times, NorthPointe seems to argue (as it did below) that §1(a) barred its termination as a subadvisor under *any* circumstances for three years post-closing. *See* AB at 1, 11; A233; A248.

other six funds." AB at 1. If, as this argument seems to imply, the termination provisions of §1(a) apply only to "the other six funds" and not the NorthPointe NVIT, then NorthPointe necessarily is advocating that the NorthPointe NVIT's listing as a Sub-Advised Fund in Schedule 1 is a typographical error, since §1(a)'s termination provisions expressly apply to "each" of the "Sub-Advised Funds" listed in Schedule 1. A1078. On the other hand, NorthPointe argues that "Exhibit D's Paragraph 2 obligates Nationwide to conduct marketing campaigns *on all seven funds*." AB at 11. A necessary predicate of this argument is that the NorthPointe NVIT *is* properly listed in Schedule 1, as §2 of Exhibit D obligates Nationwide to "launch a marketing campaign that will include *the Sub-Advised Funds*[.]" A1078.

NorthPointe's hedging is understandable. The Superior Court's "typo" theory gives NorthPointe what it seeks and what the unambiguous language of §1(a) and Schedule 1 does not afford – *i.e.*, carving the NorthPointe NVIT out from §1(a)'s fiduciary and "Nationwide Standards" safe harbors and its $3.5 million termination fee cap to be paid in the form of a reduction in Nationwide's outstanding note. *See* OB at 31-35. But NorthPointe did not file a reformation claim, and it could not credibly contend that the NorthPointe NVIT was erroneously listed in Schedule 1 given that:

- The PA was, in NorthPointe's words, "carefully-negotiated," AB at 1, by sophisticated parties and lawyers (Skadden Arps and Goodwin Procter);

- Every term sheet and draft PA included the NorthPointe NVIT in the termination provisions that ultimately became §1(a), A776-77; A782-83; A788-89; A831-32; A836-37; A871; A937; A1001;[3]

- NorthPointe treated the fund as a "Sub-Advised Fund" in all four versions of its complaint, *see* A55-56(¶¶11-12, 17-18), A137-39 (¶¶19-20, 26-27), A148-49 (¶¶61A, 61I, 61J); AR6-7 (¶¶11-12, 17-18); AR27-28(¶¶19-20); AR29-30 (¶¶26-27), AR34 (¶45); AR39 (¶61B);

- NorthPointe expressly alleged "in the alternative" in the operative Third Amended Complaint that Nationwide violated its "express obligation under the [PA] . . . not to terminate NorthPointe's Sub-Advisory Agreements" when it "liquidat[ed] ***six of the seven*** Sub-Advised Funds" – *i.e.,* all of the funds listed under Schedule 1 (*including the NorthPointe NVIT*) except for the Large Cap Value Fund, which NorthPointe continued to subadvise into this litigation, A149;

- In his deposition, NorthPointe's 30(b)(6) witness explicitly rejected the notion that the NorthPointe NVIT's inclusion in Schedule 1's listing of Sub-Advised Funds was a typographical error, A1567;

- NorthPointe maintained in its opening statement at trial and its closing that the NorthPointe NVIT was covered by §1(a), A439, A458, A1448-50; and

- Exempting the "crown jewel" NorthPointe NVIT from the protections afforded by §1(a), leaving it subject only to lesser protections afforded by §1(b), makes no sense, *see* OB at 31-35.

It is telling that, although NorthPointe advanced various and even directly contradictory theories during this litigation,[4] it never argued that the listing of the NorthPointe NVIT as one of Schedule 1's Sub-Advised Funds was an error.

[3] To be precise, the initial draft PA did not list specific funds but used the defined term 'Sub-Advised Funds," and thus implicitly incorporated in that term the funds listed in the final term sheet upon which the draft PA was based. *See* A840, A871. Every term sheet and every subsequent PA expressly listed the NorthPointe NVIT as the first fund covered by the termination fee provisions that ultimately were memorialized in §1(a).

NorthPointe does appear to endorse the Court's holding that the NorthPointe NVIT was erroneously listed in place of the Nationwide Mid Cap Growth Fund under the heading "Termination Fees" in Schedule 1. *See* AB at 21. Putting aside the fact that NorthPointe never made this reformation claim below and that there is no clear and convincing evidence of a mutual mistake, it is critical to note that even if the NorthPointe NVIT were deemed to have been erroneously listed under the "Termination Fee" heading of Schedule 1, the listing of the fund under the "Sub-Advised Funds" heading would still make it subject to the termination fee cap and safe harbor provisions of §1(a).

* * * *

The actions Nationwide took that gave rise to this law suit were expressly authorized by the plain and unambiguous language of the PA, a fully integrated contract negotiated by sophisticated parties with sophisticated lawyers. Allowing the Superior Court's Opinion and its denial of Nationwide's summary judgment motion to stand "would set a precedent that would undermine parties' abilities to negotiate and shape commercial agreements." *EV3, Inc. v. Lesh, M.D.*, ___ A.2d - ___, 2014 WL 4914905, at *2 (Del. Sep. 30, 2014).

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[4] *Compare, e.g.,* AB at 26 ("even a cursory review of §1(a) reveals its ambiguity") *with* Closing at A584 ("it would be improper to consider parol evidence in support of Nationwide's [interpretation of] §1(a)"), *and* AB at 29-30 (arguing that AUM redemption from NorthPointe NVIT and its merger support "an express breach of §1(b)") *with* Closing at A472 ("nothing in the Purchase Agreement expressly prohibited Nationwide from . . . moving money out of the [NorthPointe NVIT] . . . or merging [it] into a competing fund.").

COUNTERSTATEMENT OF FACTS

The November 25, 2008 Letter

NorthPointe states that ***"Crucially, Nationwide's November 25, 2008 Letter reveals that Nationwide itself treated the 'Termination Fee' clause of Schedule 1 as including the Nationwide Mid Cap Growth Fund, even though that fund was not expressly listed there."*** AB at 23. This statement is simply not true. The letter in question makes no reference to Schedule 1's "Termination Fee" clause, and Nationwide has never argued that the Nationwide Mid Cap Growth Fund was listed under the "Termination Fee" heading in Schedule 1 or that the PA sets forth a termination fee formula for the Nationwide Mid Cap Growth Fund. *See* A1216-21; OB at 19. The Nationwide Mid Cap Growth Fund *is* listed, however, under the "Sub Advised Funds" heading in Schedule 1 – *as is the NorthPointe NVIT* and the five other NorthPointe funds. A1080. Accordingly, in its letter, Nationwide treated *both* the NorthPointe NVIT and the Nationwide Mid Cap Growth Fund as governed by the termination fee provisions of §1(a). A1216-21.

NorthPointe's Performance

NorthPointe does not – and could not credibly – challenge the accuracy or legitimacy of the industry data Nationwide cited in support of its assertion in its Opening Brief that "[w]ith the exception of the Large Cap Value Fund, all of the

NorthPointe subadvised funds listed in Schedule 1 performed poorly by industry standards from the closing [September 27, 2007] through the last quarter (ending September 30, 2008) before Nationwide took action that resulted in the termination of NorthPointe's subadvisory agreements of those funds." *See* OB at 20-21. Indeed, its own witnesses acknowledged the accuracy and legitimacy of the data. A1517; A1545; A1557; AR166; AR183; *see also* A1587.

NorthPointe, however, misleadingly suggests on two occasions in its Answering Brief that record evidence undermines the accuracy of Nationwide's description of NorthPointe's dismal performance in 2007 and 2008. First, NorthPointe states that a Merrill Lynch "independent report," *see* A740-43, "touts NorthPointe's 'superior performance' compared to industry benchmarks . . . and *provides an objective view of NorthPointe's 2007 performance – which undercut Nationwide's claims at trial*." AB at 10-11. In fact, the performance data in the Merrill Lynch document in question is dated "as of December 31, *2006*." *See* A741. Merrill Lynch offered no views as to NorthPointe's performance in 2007 or 2008.

Second, citing the testimony of Robert Glise, a manager of the NorthPointe NVIT, NorthPointe asserts that it "outperformed industry benchmarks from 2002 through 2011." AB at 17. But this assertion misses two crucial points. First, Glise testified about the performance of the NorthPointe NVIT only; he offered no

testimony about other funds. Second, Glise's actual testimony was that during that 13-year period "*on an average year*, [the NorthPointe NVIT] outperformed [its benchmark] by over 200 basis points and more importantly, it was consistent. *65% of those periods of time, it outperformed*." AR164. More specifically, he testified that the NorthPointe NVIT "outperformed" in 2002, 2003, 2004, 2006, 2009, 2010, and 2011, and over a ten-year period (2002-2011), AR164, AR172; but he admitted that 2007 and 2008 "was a very difficult market for [the NorthPointe NVIT] to perform well in" and "we just had a rough patch." AR171; AR173. Most importantly, Glise testified that he had no objection to Nationwide's reliance on the Russell mid cap growth benchmark and Lipper peer group rankings to measure the NorthPointe NVIT's performance. AR166. And it is undisputed that as of September 30, 2008 – the relevant date for this case – the NorthPointe NVIT was ranked in the bottom 10% of its Lipper peer group on both a one-year and three-year basis and had underperformed its Russell benchmark by 492 basis points 328 basis points respectively for those periods. A1220.

A Termination Fee Cap of $3.5 Million Was Not Economically Irrational

As it did below, NorthPointe insists on appeal that "it defies logic" for it to have paid $25 million for Nationwide's 65% share of NorthPointe Capital if Nationwide could terminate NorthPointe's sub-advisory agreements the day after the closing subject to the payment of termination fees capped at $3.5 million. *See*

AB at 41. NorthPointe's position is legally irrelevant, *see Nemec v. Shrader,* 991 A.2d 1120, 1125 (Del. 2010), and factually wrong. The subadvised funds comprised only 20% of NorthPointe's AUM.[5] A363, A1440. The "crown jewels" of NorthPointe were *not* the NorthPointe NVIT, but rather, the 74 institutional accounts NorthPointe managed. A363, A1440. Indeed, Merrill Lynch, whose "independence" NorthPointe touts, assessed the mid-point value of NorthPointe Capital (*i.e.,* 100% of the enterprise) as between $63 million and $73 million and the value of the sub-advised business as between $9.5 and $9.9 million. *See* A699. (Notably, these valuations were substantially higher than the $38.36 million enterprise value implicit in the $25 million closing consideration NorthPointe paid for Nationwide's 65% interest in the enterprise.) Second, as Cahill testified, NorthPointe expected that it would generate $9 million in total *revenue* from managing the seven sub-advised funds over the three-year period post closing. A1543. Thus, it does not "defy logic" to agree to a provision that would clawback up to $3.5 million in anticipated *profits* for that period in the event of a premature termination of NorthPointe's subadvisory agreements. Third, the termination fee cap mirrors the $3.5 million cap on the earnout Nationwide stood to win if NorthPointe's performance exceeded expectations. A1021.

[5]*Contrast* AB at 17 ("Nationwide accepted NorthPointe's $25 million for the right to sub-advise seven funds").

Ibbotson's Role in Selecting The Funds and Allocations in the NAA

Tellingly, NorthPointe does not even address the testimony of Ibbotson's John Thompson or the description of Ibbotson's role in the NAA in Nationwide's SEC filings, VA/VL contracts, and marketing brochures. Instead, NorthPointe misleadingly states that "Nationwide's Grugeon admitted that its Funds Board was obligated to use its business judgment to consider Ibbotson's recommendations [B66-67] and Nationwide's Spangler, not Ibbotson, made the final decision to move the funds. [B86]." AB at 14 (ellipses in original). With respect to Grugeon's testimony, NorthPointe conflates – as it did throughout trial – the NAA with a different Nationwide asset allocation program called the Fund of Funds. Grugeon was explicit in his testimony that "[t]here's two separate issues here as far as Ibbotson is concerned. One has to do with advice for . . . fund [of] fund for NFA, which is a mutual fund business. The other was recommendations by Ibbotson for the [NAA]." B67. For the NAA, Nationwide Investment Advisors ("NIA") was the SEC-registered advisor and Ibbotson was the subadvisor; and, consistent with the Nationwide's SEC disclosures and its contractual obligations to its VA/VL customers enrolled in the NAA, *see* OB at 12-13, Grugeon testified that "*Ibbotson was the de facto investment expert and [NIA] did follow all of those recommendations absolutely*." B67. With respect to the Fund of Funds program,

Nationwide Fund Advisors ("NFA") was the advisor of the funds in question and Ibbotson was not a subadvisor, but rather a consultant, whose advice NFA would consider and "use [its] best business judgment in analyzing[.]" B67.

Northpointe's statement that NFA's President Spangler made the "final decision to move the funds" is a half-truth. As Ibbotson's Thompson explained at trial, the actual execution of the transfers of assets from and to the funds that comprised the NAA Models was made by Nationwide. A1625; *see also* A1616. But, consistent with its SEC filings and contractual obligations, Nationwide executed those transfers based on Ibbotson's allocations and selection of the funds. OB at 13-15; A599; A672; A641; A1612; A1624.

NorthPointe understandably makes no effort to defend the Court's finding that "there was no contemporaneous mention of Ibbotson in any of the notifications from Nationwide to NorthPointe about the various . . . redemptions." Op. 37. As noted in the Opening Brief, OB at 14-15, Nationwide's notification to NorthPointe of the July 1, 2008 redemption, was introduced at trial, mentions Ibbotson by name three times, and explicitly discusses the fact that Ibbotson made the decision to redeem the $260 million in AUM from the NorthPointe NVIT. This finding and the Court's finding that there was no credible record evidence to support Nationwide's argument that Ibbotson's fund selections and NAA allocation decisions were binding on Nationwide are clearly erroneous.

ARGUMENT

I. NorthPointe's Arguments Fail to Justify The Court's *Ultra Vires* Reformation of The PA and Erroneous Denial of Summary Judgment

A. The Court Reformed the PA

NorthPointe's argument that the Superior Court did not reform the PA when it excised the NorthPointe NVIT from Schedule 1 but instead made an "interpretation of a latent ambiguity," AB at 21, should be dismissed out of hand. When a court interprets a contract's terms, it "give[s] effect to the parties' intent *based on the parties' words and the plain meaning of those words.*" *i/m Information Management Solutions, Inc. v. Multiplan, Inc.*, 2014 WL 1255944, at *5 (Del. Ch. March 27, 2014). Reformation, on the other hand, "is, by definition, a judicial *rewriting* o[f] a written contract to reflect the true intent of the parties[.]" *Travelers Indemnity Co. v. Reynolds Metals Co.*, 1995 WL 606317, at *2 (Del. Ch. Oct. 2, 1995). *See also* Arthur Linton Corbin and Joseph M. Perillo, Corbin on Contracts § 24.18 (2003) ("[R]eformation is . . . a request that the court alter the words of the document. This alteration may involve deleting words or punctuation, rearranging words or punctuation, or inserting words or punctuation. In contrast, a party who seeks interpretation asks the court not to change the actual words of the document but to determine the meaning of those words."). There is nothing ambiguous about "Nationwide NVIT Mid Cap Growth Fund," and the

Court did not find that term to be ambiguous. Rather, the Court rewrote – and thus reformed – the PA by deleting the term from Schedule 1.

B. Nationwide Did Not Confuse the Two Mid Cap Funds

NorthPointe's assertion that "[d]uring the negotiations, *the parties* confused the names of" the NorthPoint NVIT and the Nationwide Mid Cap Growth Fund, AB at 23, is simply not true. NorthPointe cites in support of that assertion "a critical internal e-mail exchange . . . [in which Grady and Hallowell] *improperly used* 'Mid Cap' when they obviously mean the 'Mid Cap NVIT' fund, a fact admitted by Nationwide's Grady." AB at 23. But Grady did *not* in fact admit to "improper use" of any term in the email in question. *See* A1490. Moreover, it is obvious from the email's substance that it addressed the NorthPointe NVIT only. The email's references to $300 million AUM (the NorthPointe NVIT's AUM at the time was in excess of $400 million; the Nationwide Mid Cap Growth Fund's AUM was approximately $5.2 million, *see* A1307), and VA/VL assets (housed only in NVIT funds), make clear that Grady and Hallowell were simply using the shorthand "Mid Cap Growth" to refer to the NorthPointe NVIT. *See* A944.

There was in fact *no record evidence* that *Nationwide* had an understanding that the NorthPointe NVIT was wrongly listed in Schedule 1. On the contrary, Grady, whom the Court deemed credible and who originated the termination fee formula used in the PA, testified that the NorthPointe NVIT's listing was "not a

mistake," and that when he first drafted the formula (in April 2007), he had "started with the [NorthPointe NVIT] because "it's the largest fund . . . and it would have been the fund to get central agreement on." A1497; AR148. Moreover, the terms sheets, draft PAs, NorthPointe's pleadings, and the deposition testimony of its 30(b)(6) witness demonstrate clearly and convincingly that *NorthPointe* itself did not believe that the fund's listing in Schedule 1 was an error. *See* OB at 30; *supra* at 2-3. Indeed, in its initial complaint, under the heading "The Purchase Agreement's Ambiguities," NorthPointe identified four "ambiguities," two of which were in Schedule 1; but it did not allege that the Schedule's listing of the NorthPointe NVIT was an ambiguity or an error. *See* A57-58.

C. The NorthPointe NVIT Was Merged *and* Liquidated, Resulting in The Termination of NorthPointe's Subadvisory Agreement

As an alternative to the Court's "typo" reformation ruling, NorthPointe reprises its trial position that §1(a) did not apply to Nationwide's actions with respect to the NorthPointe NVIT because "Nationwide did not recommend liquidation or termination; [but] rather . . . 'a plan of reorganization pursuant to which the [fund] will merge into the [NVIT MM].'" AB at 15-16 (quoting A1220). Here, again, we have a half-truth. What NorthPointe fails to disclose is that the plan of reorganization that Nationwide recommended to the Fund Board and shareholders expressly included the "liquidation and dissolution" of the NorthPointe NVIT once the merger was effected. *See* A1242 (Board resolution

approving "liquidation and dissolution of [the NorthPointe NVIT] in accordance with the terms of the Plan of Reorganization"); AR154-55 (notice of special meeting for fund shareholders to vote on "Plan of Reorganization" pursuant to which NorthPointe NVIT will be "liquidated and dissolved"). As Nationwide's expert, Erik Sirri, whom the Court deemed credible (Op. at 28), explained:

> A merger is the combination of two funds, one a surviving fund and the other a liquidating fund. The assets of the two are combined and the surviving fund goes on as an operating entity; the liquidating fund is dissolved. A1639.

In this case, the NorthPointe NVIT was the liquidating fund, and thus it ceased to exist after the merger was consummated. *See also* A1491 (testimony by Grady, also deemed credible, Op. at 8 n.7, that "[a] merger means that one or the other of the funds in the merger will no longer survive").

NorthPointe actually alleged in its Third Amended Complaint that the NorthPointe NVIT *was* liquidated. *See* A149 (¶63I) (alleging Nationwide "liquidat[ed] six of the seven Sub Advised Funds" (*i.e.*, all but the Large Cap Value)). Cahill refused to acknowledge at trial that the NorthPointe NVIT was ultimately "liquidated," but he conceded that the fund "*disappear[ed]*" once the merger was completed. A1537. In truth, whether the ultimate disposition of the fund is characterized as a disappearance, liquidation, or merger is of no moment. The termination fee provisions in §1(a) expressly apply to "any other action to cause [the] termination" of the "sub-advisory agreement." *See* A1078; OB at 17.

The material point – and one to which the parties stipulated in the Pretrial Order – is that "[t]he merger . . . divested [NorthPointe] of any further ability to subadvise the [NorthPointe NVIT] and earn any revenue by doing so." A371. Thus, the plan of reorganization effectively terminated NorthPointe's agreement to subadvise the fund, and §1(a) governs the actions Nationwide took with respect to the fund.

One would have thought it beyond dispute whether the disposition of the NorthPointe NVIT resulted in the termination of NorthPointe's agreement. Indeed, NorthPointe alleged in its first three complaints and "in the alternative" in its Third Amended Complaint that Nationwide *had* terminated the NorthPointe NVIT subadvisory agreement. *See* A55, 57, 60, 64 (¶¶11-12, 19, 39, 66); AR6, 11 (¶¶14, 15, 35); AR27, 28, 39 (¶¶19, 20, 61B); A149 (¶¶63I-63J). At trial, desperate to avoid §1(a)'s fiduciary and performance safe harbors and its $3.5 million termination fee cap, NorthPointe tried mightily to avoid an admission that its NorthPointe NVIT agreement had been terminated. But when asked on cross-examination whether NorthPointe's "sub-advisory agreements are effectively terminated when NorthPointe is no longer managing the assets in those funds," Cahill conceded, "The contract is nullified." A1558.

The contemporaneous parol evidence also established beyond doubt that NorthPointe understood that the termination of its subadvisory agreement was the consequence of the NorthPointe NVIT's merger. Nationwide informed

NorthPointe of its decision to take action with respect to the NorthPointe NVIT and four other funds by letter dated November 25, 2008. A1216. Tellingly, in NorthPointe's formal response to this letter, NorthPointe referred to Nationwide's letter as "the Termination Letter," A1294, and stated that "the proposed merger of th[e] [NorthPointe NVIT] into the [NVIT MM] **(*and the consequent termination of NorthPointe as an advisor*)**" breached the PA. A1295.

Finally, NorthPointe's assertion that "the terms 'merger' and 'termination' have distinct meanings in the mutual fund industry[ ]" and the testimony it quotes in support of this assertion are red herrings. *See* AB at 26. It is undisputed, and of no consequence, that the termination *of a subadvisory agreement* and the merger *of a mutual fund* into another fund are different things and that a fund advisor can unilaterally terminate a subadviser but must get shareholder approval to merge a fund. In this case, by recommending a merger, Nationwide "[took] any other action to cause such termination" of the sub-advisory agreement for the NorthPointe NVIT, and thus its conduct falls within the plain and unambiguous provisions of §1(a).

II. The Superior Court Did Not Reject An Argument That A Finding of An Express Breach of §1(b) Was Barred by The Law of The Case

NorthPointe's statement that the Superior Court "rejected Nationwide's 'law of the case argument[,]'" AB at 28, is another example of the half-truths it has employed throughout this litigation. It is true that Nationwide made a law of the case argument below, but it is not true that Nationwide argued that the law of the case barred reconsideration of the §1(b) express breach claim. Indeed, NorthPointe did not present a §1(b) express breach claim at trial. (Nationwide argued in its closing that NorthPointe had presented at trial a *fraud* case based on non-disclosures that was barred by the predecessor court's dismissal of NorthPointe's silent fraud claim. *See* A509-11.) Thus, whatever the Court may have meant when it stated that "the law of the case does not operate as a bar to NorthPointe's claims presented at trial," Op. 4 n.1, the Court was not addressing the law of the case argument at issue in this appeal. Moreover, at the conclusion of trial, the Court expressly stated that the prior rulings of the Court's predecessor would have preclusive effect. *See* A1643 (MR. CONNOLLY: Judge, just a question. I think it is obvious but I want to make sure. Judge Herlihy's decisions[,] today, I assume are the law of the case? COURT: Yes, we would have to assume that.").

Notably, NorthPointe does not address in its Answering Brief the fact that it deleted the paragraph in its Second Amended Complaint that had alleged an express breach of §1(b), *see* A147 (striking ¶61A), or that the Third Amended

Complaint, which was the operative complaint at trial, did not allege an express breach of §1(b), *see* A133-59. As NorthPointe stated in its motion to file the Third Amended Complaint, the deletions and additions it made to the Second Amended Complaint, "clarifie[d] [NorthPoint's] allegations so that is clear how Defendants' conduct breached the Purchase Agreement" and "conform[ed] the pleading to this Court's earlier rulings." AR55-56 (¶¶9,11).

NorthPointe also does not address the fact that it conceded in its closing brief that "[i]t is true that nothing in the Purchase Agreement *expressly* prohibited Nationwide from secretly creating a competing fund, or moving money out of the NorthPointe-managed fund and into a new fund, or merging the NorthPointe managed fund into a competing fund." A472 (emphasis in the original). In light of this admission, the deletion of the §1(b) express breach claim from the Third Amended Complaint, and the fact that Nationwide tried the case with the justifiable understanding that the claim had been dismissed and was no longer operative, there are no extraordinary circumstances that would warrant an exemption from the law of the case doctrine.

III. The Court's Implied Covenant Rulings Were Erroneous

A. The Court's "Disingenuous Claim" Ruling Was Erroneous

This Court should reject NorthPointe's arguments that the Superior Court did not err in basing its implied covenant ruling on what it called a "disingenuous claim" that Nationwide was not obligated to pay termination fees under §1(a). First, whether NorthPointe was owed termination fees is a subject "expressly covered by the contract," and thus the implied covenant is inapplicable. *See Dave Greytak Enters., Inc. v. Mazda Motors of Am., Inc.*, 622 A.2d 14, 23 (Del. Ch. 1992), *aff'd* 609 A.2d 668 (Del. 1992). "[T]o the extent that [a plaintiff's] implied covenant is premised on the failure of defendants to pay money due under the contract, the claim must fail because the express terms of the contract will control such a claim." *Kuroda v. SPJS Holdings, L.L.C.*, 971 A.2d 872, (Del. Ch. 2009). The Court's "disingenuous claim" holding cannot stand because it turns on an interpretation of an express contractual provision, not an assessment of an obligation implied in the PA.

Second, there is no record evidence to sustain a finding that Nationwide was disingenuous in articulating an interpretation of criterion 4 of the Performance Standards as encompassing one period of three consecutive years. To the contrary, Nationwide's interpretation is the *only* interpretation of the Performance Standards and §1(a) that gives meaning to all of the PA's terms. *See* OB 33-34, 41-43.

Moreover, the Court itself deemed the Standards to be ambiguous, as it held a trial and allowed the admission of parol evidence to interpret them. Indeed, as expressly alleged in its initial complaint, *NorthPointe* deemed the Performance Standards ambiguous:

> 29. T[he] contractual language is ambiguous as to when the three-year and five-quarters take place (i.e., whether any part of those periods may take place before the Purchase Agreement was executed).
>
> 30. T[he] contractual language is further ambiguous as to the meaning of the word 'consecutive' (i.e., whether the five quarters are measured as one sum total or as five separate one-quarter benchmarks). [A58]

Third, the fact that Grugeon or Wetmore (a Funds Board member, not an employee or agent of Nationwide) did not read the PA does not establish "arbitrary or unreasonable" conduct on Nationwide's part. On the contrary, Grugeon's and his Nationwide colleagues' roles as fiduciaries to the funds' shareholders *required* them to ignore whatever financial obligations Nationwide might have had to NorthPointe when they decided what actions to take with respect to the funds. *See SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 191 (1963). The decisions that led to NorthPointe's termination and the determination as to whether NorthPointe was owed Termination Fees are two different things. Spangler, who signed the Termination Letter that addressed *inter alia* whether Nationwide's

actions were "Permitted Terminations" that did not require the payment of termination fees, *had read* the PA's Performance Standards. *See* AR180.[6]

Finally, NorthPointe's argument that "[t]he Court's ruling was also supported by what the [Termination Letter] *does not* state: it makes no reference to any fiduciary obligation," AB at 34 (emphasis in original), is easily dismissed. Although irrelevant, in fact, Nationwide stated *four times* in the Termination Letter that its decisions to make its recommendations with respect to the funds were made with the "best interests of the shareholders" in mind. *See* A1298, 1299, 1300.

B. The Court's "Redemption" Ruling Was Erroneous

Notably, NorthPointe does not address (1) the fact that the Court itself acknowledged that "[a]ccording to Grady, it was necessary for Nationwide to retain the option of redeeming assets [from] the NorthPointe NVIT," Op. 23, or (2) Grady's July 2007 email in which he rejected contractual language proposed by NorthPointe for §1(b) on the ground that Nationwide could "not promise not to redeem shares" from the fund because of contractual obligations it owed VA/VL policyholders. *See* OB at 39. Nor does NorthPointe point to any record evidence or language in the PA that could support a finding that Nationwide would have agreed to limit itself from redeeming assets from the NorthPointe NVIT. *See Nemec,* 991 A.2d at 1127 n.20. Finally, as noted above at 9-10, NorthPointe does

[6] The Court's finding, without citation, that "Spangler expressly testified that he had not read the Purchase Agreement," Op. 41, is clearly erroneous.

not (and could not) rebut the fact that, consistent with its SEC disclosures and VA/VL contractual obligations, Nationwide redeemed the $260 million at Ibbotson's direction and thus cannot be said to have acted arbitrarily or unreasonably.

C. The Court's "Fee Structure" Ruling Was Erroneous

NorthPointe does not address the fact that (1) its own expert testified that the difference in the two funds' fees "was not material," A1433, or (2) there was no record evidence that Ibbotson directed the redemption from the NorthPointe NVIT because of the fee differential. (Indeed, the undisputed record evidence affirmatively established that Ibbotson's decision to move $127 million of the AUM was *not* fee-related, as that sum was moved out of the mid-cap growth space entirely. A368, A1324.) But most significantly, NorthPointe fails to point to any record evidence that would support a finding that Nationwide would have agreed to cap the fees it charged for the NVIT MM. Because there was no such record evidence, the Court's ruling cannot stand. *See Nemec*, 991 A.2d at 1127 n.20.

IV. The Court's Interpretation of The Performance Standards Was Erroneous

NorthPointe does not even attempt to give meaning to the terms "at all times" or "a period"; nor does it attempt to explain how the three-year consecutive evaluation period could ever be measured on a "prospective-only" basis when the "Restricted Period" during which the PA's termination provisions apply is only three years. It is precisely because the Court's interpretation of the PA's Performance Standards fails to give meaning to these terms and an answer to this question that the Court's ruling requires reversal. *See* OB at 41-43.

Notwithstanding NorthPointe's protestations to the contrary, AB at 42, the trial transcript shows that Simon and Wermers opined on the legal interpretation of the Performance Standards.[7] The Court adopted the exact interpretations of the Performance Standards given by Simon and Wermers. Nationwide made timely and repeated objections to this testimony. *See* A313; A338; A346; A1576-77; AR181. Its admission was reversible error. *N. Am. Philips Corp. v. Aetna Cas. & Surety Co.*, 1995 WL 628447, at *3 (Del. Super. Apr. 22, 1995).

[7] *See* A1571 (Wermers) ("I was asked to look at the performance standard and to provide my opinion of what it meant. . . . The meaning I attribute to this performance standard is . . . that three out of three of . . . the past single year performance measurements must be in the bottom one-third peer group"); A1585-86 (Simon) ("we looked at the Nationwide standards, made our intepretation, and found that NorthPointe was in compliance with Nationwide standard. . . . In my opinion, [Nationwide] had incorrectly interpreted the specific criteria No. 4. . . . Nationwide had looked at period prior to the closing date[.]").

V. The Court's Damages Award Was Erroneous[8]

NorthPointe never addresses the fact that *its own expert* testified *on direct examination* that any "[c]ash damage that NorthPointe would be entitled to . . . ***has to be reduced by the Nationwide note for a total damage [award] of 6 million 738,253"*** (*i.e.*, Simon's "total express damages" of $15,738,243 minus $9,000,000 equals $6,738,243). This testimony, of course, is basic, common sense. The starting point and largest component of Simon's damages award is the "overpayment of the purchase price." *See* A1594. That overpayment is the difference between the $25 million NorthPointe paid at the closing and what Simon thinks NorthPointe should have paid had it known that Nationwide would breach the PA. *See* A1585. But $9 million of that $25 million was *Nationwide's* money that NorthPointe had borrowed. Thus, any final damages award must include a reduction of $9 million for what Nationwide already paid to NorthPointe.[9]

With respect to the Court's inclusion in its damages award of termination fees for the two NorthPointe-branded funds not listed under the "Termination Fee" heading in Schedule 1, NorthPointe misses the point. Cahill testified that §1(a)

[8] Contrary to NorthPointe's assertions, Nationwide did preserve its damages arguments below. *See* A566-73; A1609; AR134.

[9] Instead of reducing the damages award by $9 million, the Court reduced it by $4,831,370, which was the amount of the "revised note" Simon calculated in order to ascertain what the note would have been had the $25 million paid at closing been reduced by the $11.98 million "overpayment" and the amount of interest NorthPointe would have saved under that scenario.

applied only to the four "retail funds" and *not* the NorthPointe NVIT or the two NorthPointe-branded small cap funds. A1525. The Court, at Op. 54-55, appeared to have adopted that interpretation of the PA. Nationwide's point is that if this Court upholds the Superior Court's interpretation of the PA, then NorthPointe is *not* entitled to termination fees for the two NorthPointe small cap funds, and the Superior Court's damages award needs to be reduced accordingly.

* * * *

WHERFORE, for the reasons stated above and in Nationwide's Opening Brief, Nationwide respectfully asks this Honorable Court to reverse the Superior Court's judgment and remand the case with instructions to enter judgment in Nationwide's favor with respect to NorthPointe's Third Amended Complaint and Nationwide's counterclaim and cross claims.

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Dated: November 14, 2014